BOISE, FRIDAY, FEBRUARY 1, 2008 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**Docket No. 33750**
	)	
DEAN KEITH HICKMAN,	)	
	)	
Defendant-Appellant.	)	

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, Bingham County. Hon. James C. Herndon, District Judge.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

On May 24, 2006, Appellant Dean Keith Hickman was gambling at Fort Hall Casino (the Casino). After another patron, Edward Cain, reported his wallet was missing, the Casino reviewed its video surveillance. The surveillance showed Hickman bending down to pick something up off of the floor near Cain, going to the restroom, and then walking out of the Casino. When Hickman later returned to the Casino, he was detained by security guards and subsequently arrested for grand theft.

Dean Keith Hickman was convicted by a jury of grand theft. The district court then imposed a ten year sentence on Hickman, with one year fixed. Hickman appeals and argues that there was insufficient evidence to support a conviction of grand theft, that the district court abused its discretion by imposing a ten year sentence because the jury verdict only supports a conviction of misdemeanor theft, and that his substantial rights were violated due to the variance existing between the charging document and the jury instructions.

BOISE, FRIDAY, FEBRUARY 1, 2008 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

RALEEN BAHNMILLER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**Docket No. 32616**
	)	
JERRY BAHNMILLER and FRED BAHNMILLER,	)	
	)	
Defendants-Respondents.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Boise County. Hon. Deborah A. Bail, District Judge.

M. Karl Shurtliff, Boise, for appellant.

Bauer & French, Boise, for respondents.

Jerry Bahnmiller (Jerry) and Raleen Bahnmiller (Raleen) were a married couple who wed in 1997. Fred Bahnmiller (Fred) is Jerry's father. In 1998, a warranty deed was entered in the recorder's office of Boise County granting a parcel of property to Fred, Jerry, and Raleen. The purchase price of the property was $45,000, which consisted of a $5,000 down payment and a note for $40,000. Improvements were made to the property that included a garage that Jerry used as an auto body repair shop, an apartment above the garage where Fred lived, and a trailer home.

In 2001, Raleen filed for divorce. Fred subsequently filed a complaint to quiet title to the property. The action to quiet title was dismissed because it was not ripe for judicial review. Raleen then filed a complaint seeking a partition of the property. A court trial was held on March 15, 2005, at which only Raleen testified. At the time of trial, Jerry and Fred were unavailable to testify. The district court admitted Fred and Jerry's testimony from the divorce proceeding under the former testimony exception to Idaho Rule of Evidence 804.

The district court found that the parties were co-tenants of the property. It further found that the property could not feasibly be partitioned and ordered that it be sold. The district court awarded $86,816.47 to Fred for his contributions to the property, $1,600 to Raleen for her contributions to the property, and equal shares in the remaining balance to Fred, Raleen, and Jerry. The district court also awarded interest on Fred and Raleen's contributions.

Raleen brings this appeal arguing that the district court erred by: (1) improperly considering an exhibit that illustrated Fred's expenditures on the property; (2) determining that Fred was entitled to reimbursement for his expenditures; and (3) granting an award of interest on Fred's expenditures.

Fred rejects Raleen's arguments, and argues on appeal that the district court properly considered the exhibit illustrating his expenditures. He also argues that the district court properly reimbursed those expenditures with interest.

BOISE, MONDAY, FEBRUARY 4, 2008 AT 8:50 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF JOHN DOE I, A MINOR.	)	
----------	)	
JOHN DOE II and JANE DOE II, husband and wife,	)	
Plaintiffs-Appellants,	)	**Docket No. 34051**
v.	)	
JOHN DOE III, an individual, and JANE DOE III, an individual,	)	
Defendants-Respondents.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Derek A. Pica, Boise, for Appellants.

Taneil Groothuis-Penny, Fort Bragg, *Pro Se*, Todd Alexander Marte, Columbus, *Pro Se*, for Respondents.

The magistrate court appointed John Doe II and Jane Doe II guardians of their maternal grandchild, John Doe I, on August 8, 2006. On appeal, John Doe II and Jane Doe II, among other things, challenge the magistrate court's dismissal of their grandparent custody action under Idaho Code § 32-717.

John Doe I was born to Jane Doe III and John Doe III on May 16, 2003. Jane Doe III and John Doe III are John Doe I's biological parents but never married. Since John Doe I's birth, he has lived with his maternal grandparents, John Doe II and Jane Doe II, and they have provided the sole financial support for him.

John Doe II and Jane Doe II served John Doe III with an Amended Complaint for Grandparent Custody and/or Petition for Appointment of Guardian of Minor and on July 27, 2006, John Doe III signed a consent to the appointment of John Doe II and Jane Doe II as guardians of John Doe I. They likewise served Jane Doe III with the same complaint, but she has since failed to appear or otherwise defend.

On May 24, 2006, John Doe II and Jane Doe II filed an Amended Complaint for Grandparent Custody and/or Petition for Appointment of Guardian of Minor in magistrate court. On August 11, 2006, the magistrate court issued an order appointing John Doe II and Jane Doe II guardians of their grandson, but dismissed their grandparent custody action under Idaho Code § 32-717 on grounds that they did not have standing to bring a separate custody action under that statute as it is applicable only in divorce actions.

John Doe II and Jane Doe II appealed the magistrate's dismissal of their grandparent custody action to the district court on September 1, 2006. On February 22, 2007, the district court issued its memorandum decision, affirming the magistrate's ruling on grounds that since there was no controversy over custody, there was nothing to adjudicate. John Doe II and Jane Doe II timely appealed.

BOISE, MONDAY, FEBRUARY 4, 2008 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**Docket No. 33673**
	)	
JAMES H. KIMBALL, JR.,	)	
	)	
Defendant-Appellant.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Joel D. Horton, District Judge.

John Meienhofer, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

James Kimball pleaded guilty to statutory rape in 1992 and received a withheld judgment and three years of probation. As a result, he was required to register as a sex offender under the Idaho Sexual Offender Registration, Notification, and Community Right-to-Know Act, I.C. §§ 18-8301—8328. After he completed probation, Kimball petitioned the court to have an order of dismissal entered in his case, which the court granted. In 2006, Kimball petitioned to have his name removed from the Sex Offender Registry pursuant to I.C. § 18-8310, contending he posed no risk for re-offending. The district court denied the motion, holding that while the evidence presented by Kimball showed him to pose little risk of reoffending, it did not meet the legislative standard of no risk. Kimball appealed.

BOISE, MONDAY, FEBRUARY 4, 2008 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL MIHALKA and LINDA MIHALKA, husband and wife,	)	
Plaintiffs-Respondents.	)	**Docket No. 33571**
v.	)	
EUGENE SHEPHERD and JONI SHEPHERD, husband and wife,	)	
Defendants-Appellants.	)	

Appeal from the District Court of the Third Judicial District of the State of Idaho, Gem County. Honorable Renae J. Hoff, District Judge.

Hamilton, Michaelson & Hilty, LLP, Nampa, for appellants.

Stoel Rives, LLP, Boise, for respondents.

Mike and Linda Mihalka purchased property from Eugene and Joni Shepherd in 1998. The parties are next door neighbors. On April 9, 2004, the Mihalkas initiated a cause of action against the Shepherds alleging: breach of covenants and restrictions, nuisance, trespass, and aggravated assault. The parties participated in mediation wherein they agreed to settle and dismiss the suit. The agreement was reduced to handwriting by the mediator and was signed by both parties. However, the agreement was never formalized because the parties could not agree on all the details of the settlement.

On November 29, 2005, the Shepherds filed a suit against the Mihalkas alleging various torts. The parties participated in mediation for a second time, which also ended with the parties failing to reach a settlement. The Mihalkas then moved to join both lawsuits and filed a motion to enforce the original mediation agreement.

The district court treated the Mihalkas' motion as a motion for summary judgment and determined that the earlier mediation agreement was enforceable against both parties. The district court granted the Mihalkas' motion for summary judgment but declined to consolidate the lawsuits. Thereafter, the Mihalkas filed a petition for fees and costs pursuant to I.C. § 12-121. The district court concluded that the Mihalkas were entitled to attorney fees and costs under the provisions of the settlement agreement and granted the Mihalkas fees and costs in the amount of $22,547.42. The Shepherds timely appealed the district court's order awarding the Mihalkas fees and costs. Both parties request attorney fees on appeal.

BOISE, WEDNESDAY, FEBRUARY 6, 2008 AT 8:50 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF KATHLEEN J. ELLIOTT.	)	
----------	)	
STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**Docket No. 32265**
	)	
v.	)	
	)	
DWIGHT DOUGLAS RICE,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
KATHLEEN J. ELLIOTT,	)	
	)	
Real Party in Interest-Appellant.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Michael E. Wetherell, District Judge.

Hampton & Elliott, Boise, attorneys for appellant.

Hon. Lawrence G. Wasden, State Attorney General, for respondent.

While Kathleen Elliott represented a criminal defendant in the case *State v. Rice*, the State moved for an order requiring the defense to provide access to a potential expert witness or a report describing the potential witness's expected testimony. The State alleges that the district court ordered the defense either to allow the State to interview the witness or to submit a report summarizing the witness's anticipated testimony if the witness were called. According to the State's interpretation of the district court's order, the defense would be subjected to sanctions for the failure to fulfill at least one of the two options presented by the district court. Specifically, the defense would have to bear the costs of delay resulting from the fact that the State would require additional time to prepare for the expert witness's testimony. The defense interpreted this purported sanction as a third option, should it choose neither to submit the witness to an interview nor to supply a report. The district court interpreted its order in the same manner in which the State now interprets it, and consequently found defense attorney Kathleen Elliott in contempt of court. Ms. Elliott appeals from this ruling.

BOISE, WEDNESDAY, FEBRUARY 6, 2008 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDELL WALLER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	**Docket No. 33831**
STATE OF IDAHO, IDAHO DEPARTMENT OF HEALTH AND WELFARE,	)	
	)	
Defendant-Respondent.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Honorable Kathryn A. Sticklen, District Judge.

Bradley B. Poole, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

Appellant Randell Waller appeals from the district court's dismissal of his verified complaint wherein he belatedly sought equitable relief from a default judgment, entered eleven years earlier in favor of the State of Idaho Department of Health and Welfare, which ordered Waller to pay child support for his then wife's child. Although both Waller and his then wife were at all times aware that Waller was not the father, Waller claims he failed to raise a timely objection due to an ongoing drug addiction. On appeal, this Court must determine whether the district court was correct in its determination that the default judgment is entitled to *res judicata* effect and that Waller's request for equitable relief should be denied.

BOISE, WEDNESDAY, FEBRUARY 6, 2008 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**Docket No. 33252**
	)	
KANAY AONGOLA MUBITA,	)	
	)	
Defendant-Appellant.	)	

Appeal from the District Court of the Second Judicial District of the State of Idaho, Latah County. Hon. John R. Stegner, District Judge.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Honorable Lawrence G. Wasden, Attorney General, Boise, for respondent.

A jury convicted Kanay Mubita with eleven counts of knowingly transferring body fluid which may contain the human immunodeficiency virus (HIV), which is a felony offense under Idaho law. The district court imposed a unified sentence of four years, with four months fixed, for each count, to be served consecutively. Mubita seeks this Court's review, alleging the district court erred when it denied his motion to suppress evidence as the result of a warrantless search, effectuated by the disclosure of certain medical records to the prosecutor's office by the North Central District Health Department. In addition, Mubita asserts the district court erred when it admitted two laboratory reports pursuant to Idaho's hearsay exception for business records, violating his Sixth Amendment right to confront witnesses against him. Finally, Mubita asserts it was factually impossible for him to violate the purposes of I.C. § 39-608 with regard to one count because it is impossible to transmit HIV through oral-genital contact, and that the district court's jury instruction pertaining to his affirmative defense was improper and violated his right to due process.

BOISE, FRIDAY, FEBRUARY 8, 2008 AT 8:50 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

KENNETH COLE,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	
	)	
GLADYS ESQUIBEL,	)	**Docket No. 33502**
	)	
Defendant-Appellant,	)	
	)	
and	)	
	)	
DOES I-V,	)	
	)	
Defendants.	)	

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, Cassia County. Hon. Monte Basil Carlson, District Judge.

Saetrum Law Offices, Boise, for Appellant.

Johnson & Lundgreen, Boise, for Respondent.

Gladys Esquibel (Esquibel) appeals the district court's judgment in favor of Kenneth Cole (Cole) on grounds that district judge abused his discretion in denying Esquibel's motion for new trial and remittitur where the evidence was insufficient to justify the jury's award of economic damages, and the jury rendered its award under the influence of passion or prejudice.

On November 14, 2002, Esquibel and Cole were involved in a motor vehicle accident. Cole claimed Esquibel caused the crash; Esquibel claimed Cole contributed to the accident, including his own injuries. During the trial, Cole submitted past medical specials in the amount of $16,745.68 and presented evidence to the jury showing his injuries were permanent, his pain unlikely to go away, and that the accident seriously and permanently impaired his ability to perform usual activities. Cole presented evidence showing he has sought over-the-counter medications, chiropractic treatment, physical therapy, and prescription medications to help alleviate the pain from the accident and that these treatments would be ongoing. The court instructed the jury that the average life expectancy of a man Cole's age is twenty years.

Upon submitting the case to the jury, it found Esquibel negligent and awarded Cole a total of $165,000, with $40,000 in economic damages and $125,000 in non-economic damages. The district court entered its judgment on June 5, 2006.

On June 16, 2006, Esquibel moved for a new trial and remittitur on grounds that the jury awarded Cole excessive damages which were a result of influence of passion or prejudice; there was jury misconduct; and the evidence was insufficient to justify the award of damages. Cole objected, arguing that the evidence supported the award, and the verdict should not be disturbed. The district court issued its order on August 7, 2006, denying Esquibel's motion for new trial and remittitur and awarding Cole costs and attorney fees. On the same day, the court issued its amended judgment, awarding Cole a total judgment of $183,048.39. Esquibel timely appealed.

BOISE, FRIDAY, FEBRUARY 8, 2008 AT 10:00 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
v.	)	**Docket No. 28589**
	)	
DARRELL EDWARD PAYNE,	)	
	)	
Defendant-Appellant.	)	
	)	
DARRELL EDWARD PAYNE,	)	
	)	
Petitioner-Appellant-Cross Respondent,	)	
	)	**Docket No. 32389**
v.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent-Cross Appellant.	)	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. Thomas Neville, District Judge.

Molly J. Huskey, State Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General, Boise, for respondent.

On July 6, 2000, Darrell Payne abducted Samantha Maher from Julia Davis Park in Boise. Payne approached Maher carrying a handgun and forced Maher into the front seat of her car. He then handcuffed her wrists and drove her car to an unknown location. Payne raped Maher and then shot her. Payne disposed of her body by dumping it in a drainage tank on his property. He then drove to the Oregon coast and on to Eugene, Oregon the next day.

Payne surrendered to the Eugene police on July, 8, 2000. Because it was possible that Payne had overdosed on aspirin, paramedics transported him to Sacred Heart Hospital. At the hospital, Payne told a detective that Maher was no longer alive and that her body was in a tank behind the barn at his home. In Idaho, officers responded to the Payne residence. Maher was floating face down with a plastic bag over her head in a septic tank.

Payne was charged with premeditated first-degree murder, or alternatively felony-murder, first-degree kidnapping, robbery and rape. Payne filed numerous pre-trial motions, including a motion to suppress, which was denied. Payne also filed a notice to rely on mental health evidence. He was then examined by two expert witnesses for the State. His trial commenced on September 17, 2001. A jury found Payne guilty of premeditated first-degree murder, first-degree kidnapping, robbery and rape.

The district court proceeded to sentence Payne pursuant to Idaho's former death penalty statute, I.C. § 19-2515 (2000). The court held a three-day sentencing hearing, consisting of a full day of victim impact statements and two days of testimony. The district court issued its findings as to mitigating and aggravating factors, and sentenced Payne to death for the murder of Maher on May 31, 2002.

Payne then filed for post conviction relief. After oral argument on his petition, the district court granted the State's motion for summary dismissal of Payne's claims as to all issues except his sentence. The district court granted Payne's petition as to his sentence, concluding that Payne's death sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002). Payne filed a timely notice of appeal, and the State cross-appealed.

On appeal, Payne makes numerous arguments, including that the district court erred in not suppressing statements he made to a detective at the hospital in Eugene and that the victim impact evidence presented at his sentencing violated his constitutional rights and that his death sentence was imposed in violation of *Ring v. Arizona*. Additionally, Payne asserts that he is entitled to post conviction relief because he was denied effective assistance of counsel at his trial and at sentencing. On cross-appeal, the State argues that the district court erred in granting Payne's claim for post conviction relief based on *Ring v. Arizona*.

BOISE, FRIDAY, FEBRUARY 8, 2008 AT 11:10 A.M.

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREG OBENDORF and BOYD GRAY,	)	
	)	
Plaintiffs-Respondents-Cross Appellants,	)	
	)	
v.	)	
	)	
TERRA HUG SPRAY COMPANY, INC., an Idaho corporation,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
J. R. SIMPLOT COMPANY, a Nevada corporation, dba SIMPLOT SOILBUILDERS,	)	**Docket Nos. 31195/31217**
	)	
Defendant-Appellant-Cross Respondent.	)	
	)	
GREG OBENDORF and BOYD GRAY,	)	
	)	
Plaintiffs-Respondents-Cross Appellants,	)	
	)	
v.	)	
	)	
TERRA HUG SPRAY COMPANY, INC., an Idaho corporation,	)	
	)	
Defendant-Appellant-Cross Respondent,	)	
	)	
and	)	
	)	
J. R. SIMPLOT COMPANY, a Nevada corporation, dba SIMPLOT SOIL BUILDERS,	)	
	)	
Defendant.	)	

Appeal from the District Court of the Third Judicial District of the State of Idaho, Canyon County. Honorable Gregory M. Culet, District Judge.

Cantrill, Skinner, Sullivan & King, LLP, Boise and M. Mark Thompson, Boise, for appellant-cross respondent, J.R. Simplot Company, dba Simplot Soilbuilders.

Lynch & Associates, PLLC, Boise, for appellant-cross respondent, Terra Hug Spray Company, Inc.

White Peterson, P.A., Nampa, for respondent-cross appellants Greg Obendorf and Boyd Gray.

Respondents Greg Obendorf and Boyd Gray formed a partnership to grow asparagus in the Wilder area. Respondents' contracted with Simplot Soil Builders (Simplot) to provide full service chemigation services to their asparagus fields. After the first asparagus harvest in May of 1999, Joe Uranga from Simplot recommended applying four chemicals to the asparagus fields for weed control. Simplot arranged for Terra Hug Spray Company, Inc. (Terra Hug) to apply the chemicals. Terra Hug applied all four chemicals to the fields in the same spraying. Terra Hug encountered difficulties applying the chemicals. Screens plugged and nozzles clogged on the sprayer and the chemicals were not completely dissolved in the application tank before they were sprayed. Terra Hug did not use the recommended amount of water in the application process.

Shortly after the application of chemicals, many of the asparagus plants began to turn brown and die. The asparagus crops sustained losses and did not recover in the two years after the application. Respondents' purchaser, Seneca Foods Corporation (Seneca) recommended Respondents plow under their asparagus fields because chemical damage had rendered them unprofitable.

Respondents' initiated an action against Simplot and Terra Hug based on breach of contract, negligence, and breach of warranty. On day ten of the trial, when the parties were discussing jury instructions, the trial court permitted Respondents to amend their complaint to assert a claim based on negligence *per se* for violations of I.C. § 22-3420(1) and I.C. § 22-3420(2) against Simplot and I.C. § 22-3420(8) against Terra Hug. At trial, the jury found that Simplot had breached a contract with Respondents and both Simplot and Terra Hug were negligent. The jury awarded Respondents' damages in the amount of $2,435,906, of which, 85% was attributed to Simplot and 15% to Terra Hug. Four days before the jury announced its verdict, Seneca's asparagus purchaser, General Mills, entered into a contract to shift its source of asparagus production from Washington State to South America after the 2005 harvest. Three days after the jury announced its verdict, General Mills announced it would no longer purchase asparagus from Seneca and disclosed the existence of its contract with the South American company.

Simplot and Terra Hug filed post-trial motions for a new trial on damages based on: (i) I.R.C.P. 59(a)(4) for newly discovered evidence, which was granted by the trial court, and (ii) I.R.C.P. 59(a)(5) for excessive damages given under the influence of passion or prejudice, which was denied by the trial court. The trial court also permitted Simplot to initiate post-trial discovery pending appeal.

Simplot and Terra Hug appealed to this Court to determine: (i) whether the trial court erred when it granted Respondents' leave to amend their complaint to assert a claim based on negligence *per se*; (ii) whether the damage award was supported by reasonable certainty; and (iii) whether the trial court abused its discretion when it refused to grant a new trial based on excessive damages given under the influence of passion or prejudice pursuant to I.R.C.P. 59(a)(5). Terra Hug subsequently settled with Respondents' and dropped its appeal. Respondents' cross-appealed to this Court to determine: (i) whether the trial court abused its discretion by granting Simplot's motion for a new trial on damages based on newly discovered evidence pursuant to I.R.C.P. 59(a)(4); (ii) whether the trial court should have excluded the affidavit of David Cantrill in support of Simplot's motion for a new trial; and (iii) whether the trial court erred by authorizing post-trial discovery allowing Simplot to take depositions pending appeal. Both parties seek attorney fees on appeal.